

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DUSTIN DOWNS)	
Claimant)	
VS.)	
)	
D & D CONSTRUCTION and PORTER HOMES, INC.)	Docket No. 1,016,069
Respondents)	
AND)	
)	
LIBERTY INSURANCE CORPORATION)	
Insurance Carrier)	

ORDER

Respondent D & D Construction appeals the May 11, 2004 preliminary hearing Order of Administrative Law Judge John D. Clark. Claimant was granted benefits after the Administrative Law Judge (ALJ) determined that claimant had proven that he suffered accidental injury arising out of and in the course of his employment and had provided timely notice of accident for an injury to his right knee occurring on or about February 5, 2004. In so determining, the ALJ apparently concluded that claimant's testimony that he was an employee of respondent on the date of the accident was the most credible testimony.

ISSUES

- (1) Was there an employer/employee relationship between claimant and D & D Construction on the date of the alleged accident?
- (2) Did claimant suffer accidental injury arising out of and in the course of his employment on the date of accident?
- (3) Did claimant provide timely notice of accident pursuant to K.S.A. 44-520?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds the Order of the ALJ should be reversed.

Claimant alleges that he suffered accidental injury on or about February 5, 2004, while working as a framer for respondent. Claimant testified that he had worked for over two years for D & D Construction, with Monty Daugherty as his supervisor. However, several respondent representatives testified in this matter, contradicting claimant's allegations.

Larry Wayne Mosley, a framer who testified he began working for respondent D & D Construction in January 2004, testified that respondent's employees were working on a construction site identified as on Falcon Street. Mr. Mosley testified he knew claimant on a personal basis, as claimant had, at one time, sold him marijuana, but that claimant had never worked on Falcon Street for D & D Construction. Mr. Mosley also testified claimant did not work for D & D Construction at the Pine Meadows (Preston Trails) job or the Iron Horse job site, both jobs which followed the Falcon Street job.

Claimant acknowledged in his testimony that he had a record of criminal activity, although when asked whether he had prior convictions dealing with honesty and truthfulness, he testified only one involved honesty and truthfulness. There was an indication that claimant had a rather lengthy criminal record, although the specifics of that criminal history were never actually detailed in the record.

Respondent also provided the testimony of Jim Pinkerton, a framer and occasional foreman, who had worked for D & D Construction for approximately ten years. He testified he was on the job every working day from January 12 through February 11, 2004, and that claimant, at no time, worked for respondent during that period. He did acknowledge claimant had worked for D & D Construction before 2004.

Mr. Pinkerton's testimony was supported by the testimony of Sherry Daugherty, the owner of D & D Construction. She stated that claimant had worked for D & D Construction, but had not worked as a framer. She testified that in 2004, he worked at their farm, cutting wood with another gentlemen by the name of Michael Wells. Mr. Wells, claimant's cousin, also testified in the matter, alleging that both he and claimant worked at D & D Construction. He testified that he worked at the Preston Trails, Iron Horse and Falcon Street sites. But he stated he quit shortly after claimant began developing problems, quitting due to what he perceived as a lack of workers compensation insurance. The representatives for respondent who testified also denied having Mr. Wells as an employee of D & D Construction at any time during this period.

The testimony of Marlo Porter, the owner of Porter Homes, Inc. (the general contractor), was also provided at the time of preliminary hearing. However, claimant testified that he knew Mr. Porter, having seen him on several jobs sites. Mr. Porter testified that he was at the Falcon Street and Pine Meadows sites, and never saw claimant at either of those sites. He denied ever seeing Mr. Wells at any time prior to the filing of the workers compensation claim.

The medical history dealing with claimant's right knee injury is significant. Claimant did not seek medical treatment for this injury until approximately March 8, 2004, when he went to the emergency room at Wesley Medical Center. At that time, he informed the emergency room representatives that he injured his knee "jumping back" approximately two weeks before. Claimant advised the Wesley representatives that this would be a self pay for insurance purposes. Questions regarding whether claimant's injury was related to his work were left blank on the intake sheet.

Claimant was treated by Thomas W. Kneidel, M.D., at the Wichita Clinic, with the first examination occurring on March 16, 2004. At that time, claimant advised Dr. Kneidel that he injured his knee while putting in a window. Respondent representatives testified that the windows were not installed on the Falcon Street location until approximately February 10 to February 12. Additionally, respondent representatives testified that all framing was completed by February 2, therefore eliminating the possibility of claimant injuring his knee while framing on February 5.

Claimant testified that while working for respondent, he was paid in cash. Respondent provided payroll records, which indicated that their workers were primarily paid in cash, but there was a note provided to each worker on payday, indicating the amount of money earned and the amount of deductions. These pieces of paper were signed by the employees at the time the funds were distributed. There was no indication in the financial records of any payments to claimant or Mr. Wells. However, it is acknowledged the type of paper documentation involved would have allowed for the removal of any sheets associated with claimant or Mr. Wells, as it appeared that the records were maintained in just a small, handheld spiral notebook.

Claimant testified that when he was injured and went to the Wesley Medical Center emergency room, claimant contacted D & D Construction for permission to obtain treatment, and Monty Daugherty, the husband of Sherry Daugherty, denied knowing him.

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.¹ In this instance, the Board finds

¹ K.S.A. 44-501 and K.S.A. 2003 Supp. 44-508(g).

claimant has failed to prove that he was an employee of respondent D & D Construction on the alleged date of accident, failed to prove that he suffered accidental injury arising out of and in the course of employment and failed to prove that he provided timely notice of accident pursuant to K.S.A. 44-520. The first indication of notice to the employer was when claimant made his phone call from the emergency room on March 8, 2004. This is well over ten days beyond the alleged date of accident, February 5, 2004. Even with the amended date of accident covering the period of February 5 through February 15, 2004, it still exceeds the ten-day limitation of K.S.A. 44-520. The Board finds that claimant's notice, if provided, was untimely.

It is significant that, while Mr. Wells testified that claimant did work for respondent D & D Construction, Mr. Wells was never asked whether claimant suffered an accidental injury while employed for respondent. The testimony regarding claimant's alleged accidental injury is supported by claimant's testimony only, with contradictions being provided by Mr. Mosley, Mr. Pinkerton and Ms. Daugherty. Additionally, the testimony of Mr. Porter, the general contractor, that neither claimant nor Mr. Wells were ever present on those work sites, support a finding that claimant's testimony is not credible. Finally, the histories that claimant provided to the emergency room and to Dr. Kneidel conflict with claimant's testimony regarding how the alleged accident occurred, as claimant denied telling anyone that he jumped back or that he injured himself putting in a window. With the varying histories of the alleged injury found in the medical reports in conflict with claimant's allegations, the Board finds that claimant has failed in his burden of proof in this matter and that benefits, therefore, should be denied.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge John D. Clark dated May 11, 2004, should be, and is hereby, reversed, and claimant is denied benefits for an alleged accidental injury occurring on or about February 5, 2004.

IT IS SO ORDERED.

Dated this ____ day of August 2004.

BOARD MEMBER

c: Tamara Jo. Collins, Attorney for Claimant
Joni J. Franklin, Attorney for Respondent D & D Construction
Michael D. Streit, Attorney for Respondent Porter Homes, Inc., and Liberty
Insurance Corporation
P. Kelly Donley, Attorney for American Family Insurance Company
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director